

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,
Petitioner,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF THE STATE OF NEW YORK JOINED BY THE STATES OF ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, KENTUCKY, MINNESOTA, MONTANA, NEW MEXICO, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA AND WASHINGTON, AS *AMICI CURIAE*

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Interest of *Amici*

This case presents the Court with its first opportunity to discuss the scope of its decisions of last term in *Bruton* v. *United States*, 391 U. S. 123 and *Roberts* v. *Russell*, 392 U. S. 293. In overruling *Delli Paoli* v. *United States*, 352 U. S. 232 and in making that holding retroactive and applicable to the states, these cases have affected a substantial number of past convictions and pending trials

all over the United States and, thus, have a profound effect on the administration of justice in every jurisdiction in the country.

The brief of the California Attorney General thoroughly discusses the facts in this particular case which demonstrate that petitioner's conviction was not unconstitutional and we therefore join in that brief, adopt its arguments and support its position. The purpose of this brief is to discuss the scope of the rule enunciated in *Bruton* and the judicial standards to be employed in enforcing it.

The California Attorney General urges this Court to apply a harmless error rule to *Bruton* cases. Since the decision below rests on a holding of harmless error under state law, California has a special concern with the applicability of *Chapman* v. *California,* 386 U. S. 18. It is our position that the appropriate standard to determine whether there has been a violation of a defendant's right to a fair trial is whether there is a substantial risk of prejudice created by the introduction of a confession at a joint trial. Since that standard requires a weighing of all the aspects of the trial before error is found in the first place, the harmless error standard would not usually be pertinent.* However, if this Court holds that *Bruton* creates a *per se* rule prohibiting joint trials where confessions are introduced, it certainly should not disturb a case where the error did not harm the other defendant.

In any event, the argument in the California brief relating to harmless error also supports a due process interpretation of *Bruton* and *Roberts.*

The California Attorney General also argues that this Court should reconsider its decision in *Roberts* v. *Russell* to the extent that it holds *Bruton* retroactive. We join

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* However, if a trial Court were to err in assessing the potential risk of prejudice and denying a severance, an Appellate Court might find that, under the particular facts at trial, the risk did not develop and thus the error was harmless.

in that request and adopt the brief of the California Attorney General on this issue.

The interest of the Attorney General of the State of New York is substantial. As chief legal officer of the State of New York (New York Executive Law § 63), he is charged with maintaining a fair balance between effective law enforcement to protect society against crime and observance of due process in the administration of justice. As a prosecuting officer in specified areas of criminal conduct, and as an advisor to the District Attorneys and to the judicial officers of the State, the Attorney General is concerned with the huge volume of criminal cases handled by the New York courts and with the fact that a great many cases will be affected by this Court's decision regarding the scope of *Bruton*.*

In addition, the New York Attorney General, as counsel to the officers of the state correctional institutions who are named as respondents in habeas corpus proceedings, is concerned with the seriously disruptive effects upon the administration of justice which would inevitably flow from a retroactively applied broad condemnation of joint trials.

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* At least 16 New York convictions have recently been reversed and retrials ordered because of *Bruton*, to wit:

People v. *Mirenda*, —— N. Y. 2d ——, vol. 30 No. 16 L. Rep. News January 29, 1969 (N. Y. Ct. App. dec'd January 9, 1969); *People* v. *Baker*, 23 N. Y. 2d 307 (1968); *People* v. *Pohl*, 23 N. Y. 2d 290 (1968); *People* v. *Cefaro*, 23 N. Y. 2d 283 (1968); *People* v. *Jackson*, 22 N. Y. 2d 446 (1968); *People* v. *Boone*, 22 N. Y. 2d 76 (1968); *People* v. *Campbell*, —— App. Div. 2d (2d Dept., decided March 26, 1969) N.Y.L.J., March 27, 1969 p. 16, col. 7; *People* v. *Weis*, 30 A. D. 2d 877 (2d Dept. 1968); *People* v. *Burwell*, 30 A. D. 2d 842 (2d Dept. 1968); *People* v. *Bastone*, 30 A. D. 2d 828 (2d Dept. 1968); *People* v. *Cassidy*, 30 A. D. 2d 795 (1st Dept. 1968); *People* v. *McKendall*, 30 A. D. 2d 717 (3rd Dept. 1968); *People* v. *Pilon*, 30 A. D. 2d 365 (3rd Dept. 1968); *People* v. *Balatnicov, et al.*, N.Y.L.J., 1/28/69, p. S12, col. 4 (N. Y. Co. Sup. Ct.); *United States ex rel. LaBelle* v. *Mancusi*, 404 F. 2d 690 (2d Cir. 1968); *United States ex rel. Joseph* v. *LaVallee* (N.D.N.Y. FOLEY, D.J.) dec'd September 24, 1968) *appeal pending* 2d Cir., Docket No. 32950.

The other Attorneys General subscribing are charged with similar duties and are equally concerned. Mindful of the importance of this issue to the administration of justice in every state, the states of Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Minnesota, Montana, New Mexico, North Carolina, South Carolina, South Dakota, Utah, Virginia and Washington join the State of New York in presenting their position in this brief *amici curiae* filed with the Court pursuant to Rule 42.

Question Presented

What is the standard for assessing claims alleged to arise under the decisions of this Court in *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293?

ARGUMENT

Claims alleged to arise under *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293, should be judged by a standard requiring a determination that the introduction of a co-defendant's confession created a substantial risk of prejudice and not by a *per se* rule that the introduction of such a confession automatically vitiates the conviction.

The impact of the decisions of this Court in *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293, has been resounding in virtually every federal and state court in the country. The overruling of *Delli Paoli* v. *United States,* 352 U. S. 232, in a holding both retroactive and applicable to the States has required almost all jurisdictions to reconsider their past joint trials and their standard for severance of future trials. However, because of the extreme factual pattern of *Bruton* and the limited and rigid nature of the rule it struck down, there are no adequate guidelines for coping with the welter of

factual considerations generated by the cases. Accordingly, the instant case, insofar as it presents an opportunity for enunciating those guidelines, is of major importance to judicial administration. See *Johnson* v. *New Jersey*, 384 U. S. 719, 734.

The basic standard suggested by *Bruton* and *Roberts* for measuring the fairness of a trial in which one co-defendant's statement implicating another was or may be introduced is whether such introduction creates a substantial risk that the jury did or would consider the confession against the implicated defendant, thus prejudicing his right to a fair trial. The method of applying this standard to present and past cases will differ, but the essential conclusion of substantial risk is the same.

At the very least, the standard of substantial risk should be applied to past cases tried before May 20, 1968, the date of this Court's decision in *Bruton* as was done in *Stovall* v. *Denno*, 388 U. S. 293. To give meaning to the right of confrontation at trial, this Court created the right to counsel at the out-of-court identification in *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v. *California*, 388 U. S. 263. That rule was not applied to confrontations which had already occurred unless the violation was so substantial as to deprive the defendant of his right to due process of law. *Stovall* v. *Denno*, *supra*.

Petitioner nevertheless claims that *Bruton* states a *per se* rule presumably requiring vacation of any conviction whenever, at trial, a confession from a non-testifying co-defendant implicated the other defendant.* While some language in *Bruton* might support such a rule, the case as a whole does not and *Roberts* v. *Russell* conclusively lays the notion to rest. The genesis of *Bruton* is in *Delli Paoli*

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* Such a rule would apparently require either (1) separate trials; (2) not introducing the implicating confession; or, where possible, (3) redaction of the confession to exclude reference even to the existence of a cohort.

v. *United States* in which this Court upheld a conviction even though a co-defendant's confession implicating Delli Paoli had been admitted into evidence against the confessor with limiting instructions to that effect, the Court saying that it could "fairly proceed on the basis that the jury followed these instructions" (352 U. S. at 241). Although *Delli Paoli* itself did not speak in absolute terms (352 U. S. at 243), its progeny did until, as the Solictor General conceded in *Bruton*, the strain became to great (see 392 U. S. at 126).

In *Bruton*, the co-defendant Evans confessed that he and Bruton had committed an armed robbery. On appeal from the judgment of conviction it was held that Evans' confession had been erroneously admitted against him at trial. Apart from the confession of Evans, the only evidence against both defendants was identification testimony. That evidence as against Bruton was a great deal weaker than it had been against Evans. *Evans* v. *United States*, 375 F. 2d 355 (8th Cir. 1967). Yet on retrial, even Evans was acquitted. In the face of these facts, this Court reversed the conviction of *Bruton* and overruled the "basic premise" of *Delli Paoli* that the jury must always be presumed to follow limiting instructions of the sort given in the *Bruton* case.

The elimination of one irrefutable presumption should not, however, lead this Court to substitute another. The effect of *Bruton* is not to change the standards for measuring the fairness of a trial, but to radically readjust the weight to be given the cautionary instruction as one factor in judging that fairness. The decision did not hold that such instruction was inevitably ineffective, let alone require the rule urged by petitioner. Thus, the Court stated:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances oc-

cur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' *Lutwak* v. *United States*, 344 U. S. 604, 619; see *Hopt* v. *Utah*, 120 U. S. 430, 438; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson* v. *Denno*, *supra*, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah*, *supra*; *Throckmorton* v. *Holt*, 180 U. S. 552, 567; *Mora* v. *United States*, 190 F. 2d 749; *Holt* v. *United States*, 94 F. 2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitable suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame into others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."

That this balancing of facts represents the holding of *Bruton* was shown in *Roberts* v. *Russell*, *supra*, where the Court, indeed, quoted a part of this passage as representing the *Bruton* rule (392 U. S. at 294-5) and did not refer to the broad language relied on by petitioner. Moreover, although the Court held that the facts in *Roberts* "parallel"

the facts in *Bruton*, it did not require that the writ of habeas corpus issue but instead remanded the case to the District Court "for further consideration in light of *Bruton* v. *United States, supra.*" This disposition must indicate that there were factors which could distinguish the case from *Bruton*, although that case too, involved the implication by one defendant of another.

The very fact that *Bruton* was so perfunctorily held retroactive in *Roberts* v. *Russell*, demonstrates that the rule in *Bruton* was not of as broad a scope as petitioner contends. When this Court sets strict rules for criminal trials, it has held them not to be retroactive. See *Linkletter* v. *Walker*, 381 U. S. 618 (limiting the effect of *Mapp* v. *Ohio*, 367 U. S. 643); *Tehan* v. *Shott*, 382 U. S. 406 (limiting the effect of *Griffin* v. *California*, 380 U. S. 609); *Johnson* v. *New Jersey, supra* (limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478); *Stovall* v. *Denno, supra* (limiting the effect of *United States* v. *Wade, supra* and *Gilbert* v. *California, supra*); *DeStefano* v. *Woods*, 392 U. S. 631 (limiting the effect of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194); *Fuller* v. *Alaska*, 393 U. S. 80 (limiting the effect of *Lee* v. *Florida*, 392 U. S. 378; *Desist* v. *United States*, —— U. S. —— (#12 Oct. Term 1968, decided March 24, 1969) 37 L. W. 4225 and *Kaiser* v. *New York*, —— U. S. —— (#62 Oct. Term 1968, decided March 24, 1969) 37 L. W. 4236 (limiting the effect of *Katz* v. *United States*, 389 U. S. 347).

In *Roberts* v. *Russell*, it was stated that the practice prohibited in *Bruton* seriously impaired the integrity of the fact-finding process. 392 U. S. 293, 294. By comparison, this Court contemporaneously found that the failure to provide a jury trial did not so substantially impair the integrity of the fact-finding process. *DeStefano* v. *Woods, supra.* Therefore the practice found so dangerous in *Roberts* must be related to an assessment of the extreme facts of *Bruton.*

It should also be pointed out that *Bruton* must to some extent involve, not only the constitutional right of confrontation, but also the supervisory power of this Court over the lower federal courts. This is highlighted by the fact that *Delli Paoli,* also a federal case, dealt with the question whether or not the conviction should be reversed in the exercise of supervisory power. Thus, even if this Court were to enunciate a *per se* rule for the federal courts, it would not preclude the more flexible standard with respect to state judgments of conviction we have suggested.

The skepticism regarding the jury's ability to follow instructions evidenced by this Court's decision in *Bruton* finds its roots in decisions in complex federal joint conspiracy trials involving a conglomeration of conspiracy and substantive counts unevenly charged against many co-conspirators. Indeed, Judge Learned Hand's graphic phrase "mental gymnastic" (*Nash* v. *United States,* 54 F. 2d 1006 [2d Cir. 1932]), was meant to apply to such cases (*United States* v. *Delli Paoli,* 229 F. 2d 319, 321 [2d Cir. 1956]), where instructions must regulate whether each piece of evidence which directly implicates one defendant may or may not be used against each of the others. Even Judge Frank's eloquent dissent in *United States* v. *Delli Paoli, supra* at 323 refers to the special problems of these complicated federal cases (e.g., *United States* v. *Haupt,* 136 F. 2d 661 [7th Cir. 1943]), rather than to a joint substantive crime prosecuted in the state courts as is presented here.

The argument that *Bruton* has enunciated a *per se* rule for past, as well as for future, cases and for state as well as for federal, courts is completely untenable, because such a rule would be unrealistic and unnecessary. Obviously, the impact on the administration of justice of a *per se* holding would be enormous for several reasons. First, unlike the situation in *Jackson* v. *Denno,* 378 U. S.

368, new trials would [illegible] to be held rather than new hearings. Moreover, the number of trials to be held would almost certainly have to exceed the number of trials originally held. In the instant case, for example, all of the petitioner's co-defendants would be entitled to apply for new trials. In *People* v. *Baker, supra,* six trials may be held in place of the original one. This proliferation of new trials in the face of increasing criminal litigation is a strain on the state courts which they are not presently prepared to handle.

Retroactive application of the stringent interpretation of *Bruton* proposed by petitioner would have another, more disastrous effect: overturning of the convictions of countless felons, whose trials in state or federal courts were conducted in accordance with principles approved by this Court. There is a curious suggestion in *Roberts* v. *Russell,* that reliance on this Court's unequivocal ruling in *Delli Paoli* was unjustified because the decision had been criticized since it was announced. But surely the *Delli Paoli* decision was entered in the knowledge that it would be relied upon not in the expectation that it would be repudiated. The fact is that in thousands of cases, state and federal judges did reasonably rely upon *Delli Paoli,* and upon similar rulings in many subsequent cases decided by this Court, including *Johnson* v. *New Jersey* (1966) and *Gilbert* v. *California* (1967); indeed, it is to be presumed that the criticism of the *Bruton* decision, since it was announced, is no cause for lower courts, defense counsel or prosecutors to eschew it.

It is little comfort that the direct result of retroactivity of a broad interpretation of *Bruton* would be merely new trials, not immediate release of dangerous criminals. For new trials of old cases would be impossible in many instances, due to the absence of witnesses and the dulling of recollections. And if this Court rules in *Jenkins* v. *Delaware,* No. 748, that *Miranda* v. *Arizona,* applies upon re-

trial, the result urged by petitioner will indeed mean release for many convicted felons, retrials being impossible without their own confessions.

Thus, a broad interpretation of *Bruton*, retroactively applied, could mean the release of such dangerous convicts as Henry Dusablon and Emanuel Samperi, who recently were given a post-conviction hearing in the Supreme Court, New York County, to determine, *inter alia*, the retroactive effect of *Bruton* upon their convictions for first degree murder, entered in 1963. N.Y.L.J. Feb. 21, 1969, p. 17, col. 4. Also see *People* v. *Dusablon*, 16 N. Y. 2d 9 (1965). The evidence at trial showed that Dusablon, accompanied by Samperi in a robbery at a liquor store, shot the owner and a clerk through the head as they knelt on the floor, because, as he later explained to the police, "dead men tell no tales."

At the second stage of the trial, devoted to punishment, it was shown that these victims were among six whom the pair executed during a spree of robberies in New York City and Massachusetts, killing the witnesses to avoid identification. At the trial on the issue of guilt or innocence each defendant's full confession to the liquor store killing, implicating the other, was introduced. The convictions were confirmed by the lower court, on the ground that less prejudice attached than was found in *Bruton*. A *per se* rule would require reversal of the convictions, and even a standard of harmless error beyond a reasonable doubt would jeopardize them. If applied on the retrials, the defendants would go free. But surely a more sensible test is that new trials should not be required if there was no substantial risk that the defendant was prejudiced by the co-defendant's confession.

The standard here proposed would adequately expose past cases in which the integrity of the fact-finding process was significantly impeached. In this respect, the arbitrary *per se* test or a test of harmlessness beyond a reasonable doubt is unnecessary. In *Stovall*, where the Court was

also concerned with effective confrontation—of innocent eyewitnesses, not accomplices—those tests were rejected as to past cases; only for future cases was a stringent standard of harmlessness adopted for testing the effect of the absence of counsel at a line-up.

In other situations where the integrity of the fact-finding process was not irrelevant to the purpose of the new ruling, this Court has denied retroactivity completely, including rulings relating to the right to trial by jury, the right to the *Miranda* warnings before custodial interrogation, and comment by the court or prosecutor upon the defendant's silence at trial; plainly, a new constitutional ruling need not be applied retroactively, such that only harmless error beyond a reasonable doubt will save a conviction, merely because the ruling was designed to enhance the integrity of the fact-finding process. Decisions to that effect have weighed the probability that the verdict of guilt was unreliable against the disruption to the administration of justice stemming from retroactivity, and reliance on prior rulings. Reliance upon *Delli Paoli*, *Gilbert*, *Johnson* and other cases was justified, we submit. Disruption from retroactive application of a broad interpretation of *Bruton* is clear. On the other hand, impeachment of the verdict of guilt is remote where there is no substantial risk that the jury was prejudiced by the co-defendant's confession. The accuracy of the verdict of guilt is threatened only where two occurrences combine: the jury was persuaded in its verdict by the co-defendant's confession and that confession was false.

Moreover, to the extent that a *per se* rule would virtually abolish the joint trial in the future, it is undesirable. While the Court in *Bruton* pointed to very real patterns of abuse resulting from an exaggeration of *Delli Paoli's* expressed faith in the efficacy of instructions by the trial court, it did not announce a strict rule against joint trials, and should not now. In *United States* v. *Bozza*, 365 F. 2d 206, 217 (2d Cir. 1966), Judge Friendly anticipated

Bruton in rejecting the idea that the Judge's instructions will necessarily cure prejudice in these cases but he similarly rejected the idea that they are never sufficient.

The rule announced in that case is that the factors supporting a joint trial must be balanced against those militating for severance on a case by case basis. Judge Weinfeld's excellent discussion in *United States* v. *Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1962), is to the same effect.

The prosecution should not be required in every case to elect between a joint trial and admission of a confession against the maker. A voluntary confession often is the best evidence of guilt and is absolutely necessary if certain crimes are to be prosecuted at all. See *Miranda* v. *Arizona*, 384 U. S. 436.

The basis of the joint trial in the instant case is that four people robbed a liquor store and in the process killed an employee. Those are the facts which must be presented to the jury whether the defendants are tried separately or together. Most of the evidence introduced in this case or in many of the thousands of similar cases will be applicable to all the defendants. Also see *United States* v. *Smith*, 209 F. Supp. 907, 914 (E. D. Ill. 1962). To the extent that a trial is a search for truth, it is preferable to try the case in one piece. The joinder in this case, as in most other joint trials, is not the deliberate scheme of the prosecutor but of the perpetrators. This view of a joint trial was one of the important underlying bases for the development of the theory in the Second Circuit which resulted in that court's and this Court's decisions in *Delli Paoli*. In curing the deficiencies in an absolute treatment of *Delli Paoli*, it would be a mistake to go to the other extreme and forget the wisdom on which it is based.

When the proof presented against one defendant who is tried alone must demonstrate the guilt of four, an element of confusion must enter the jury room. Of course, the Court will instruct the jury to disregard the absence

of the other defendants but in order to believe that they could reach a just result, we again are thrown back on the assumption that juries follow the court's instructions. Just as joint trials have been abused by prosecutors deliberately laying before them evidence admissible against only one defendant (*Bruton* v. *United States, supra,* at 136), defense lawyers have exploited the fact of severance to insinuate doubt in the juror's mind that if four people committed a crime and only one was present, how could they be sure that the crime had been solved.

Thus, a joint trial for a joint crime is ordinarily preferable. This has consistently been the practice. For instance, under Rule 14 of the Federal Rules of Criminal Procedure relating to prejudicial joinder, courts have held that there is a strong presumption in favor of joint trials. *Brown* v. *United States,* 375 F. 2d 310, 315 (D. C. Cir. 1967), *cert. denied* 388 U. S. 915; *Golliher* v. *United States,* 362 F. 2d 594, 603 (8th Cir. 1966); *Sagansky* v. *United States,* 358 F. 2d 195, 199-200 (1st Cir. 1966); *Williamson* v. *United States,* 310 F. 2d 192, 197 (9th Cir. 1962); *Daley* v. *United States,* 231 F. 2d 123 (1st Cir. 1956), *cert. denied* 351 U. S. 964; *U. S.* v. *Crisona,* 271 F. Supp. 150 (S.D.N.Y. 1967); *United States* v. *Steel,* 38 F.R.D. 421 (S.D.N.Y. 1965); *United States* v. *Boyance,* 30 F.R.D. 146 (E. D. Pa. 1962); *United States* v. *Smith, supra; United States* v. *Kahaner, supra.*

Neither the burden on the administration of justice nor trial efficiency justifies infringement of constitutional rights, but the due process standard of substantial risk of prejudice provides ample protection for defendants while alleviating what must, in any event be a great impact on the courts. This standard is both appropriate to federal review of state decisions and provides flexibility for taking into account the numerous factors and factual variations which must inevitably arise in this area.

The litigation since *Bruton* and *Roberts* indicates that there are as many variations as there are cases and that

the factors favoring a joint trial will be very strong in one case and insignificant in another. The factors tending to create prejudice to a defendant, particularly if his co-defendant has confessed, ought to be persuasive in many instances. The same factors will be considered by a court deciding the motion to sever a future trial and one reviewing a claim of prejudicial joinder as to a past trial. However, with regard to the future trial, the court must use special care to insure that that trial will not be infected, since many of the factors are unknown. *United States* v. *Haupt, supra; United States* v. *Kahaner, supra.*

As we have just discussed, one important factor for a court to consider in deciding whether a joint trial is proper is the extent to which the charges are identical and intertwined and the extent to which the evidence against all the defendants is the same. The court must also consider whether a jury would be confused by an artificial severing of the cases.

This Court in *Bruton* indicated that the only considerations which motivated the prosecution to seek a joint trial were convenience, economy and efficieny. As Judge Learned Hand has noted, there also is the element of the search for truth (*Nash* v. *United States, supra*). Nonetheless, efficiency, economy and convenience are but materialistic names for very human needs. The convenience of victims, other innocent witnesses and citizens who serve on juries, those forgotten people of the criminal system, is underrated in the abstract. However, when trial judges are faced with concrete situations, such factors obviously have been found compelling.

A witness who has testified in a Grand Jury proceeding, who has been interviewed repeatedly by law enforcement officers, who has made numerous fruitless appearances in court now will be asked to appear more times and possibly have his personal life painfully torn apart in a way only cross-examination can do. This witness has very likely

been a victim of a painful crime and a constant testimonial reliving of his horror seems an unnecessary torture for him if there is no realistic risk of injury to the co-defendants by reason of the joint trial.

A case which graphically illustrates this point is that decided by the New York Court of Appeals in *People* v. *Baker*, 23 N. Y. 2d 307 (1968). Mr. Sugar, a Hungarian refugee, owned a small retail clothing shop in New York City. One afternoon, six young men gratuitously stabbed his wife to death and, while he futilely sought to protect her, stabbed him seven times. He was saved from death by an emergency operation and lived to tell the tale to law enforcement officials, to a Grand Jury, and to judges at several pre-trial hearings. He also testified at trial against six defendants and was cross-examined extensively by six counsel. The six men were convicted. Their convictions were reversed in light of this Court's decision in *Bruton*.

Mr. Sugar now faces the likelihood of testifying six more times about those tragic events, which were as devastating in Mr. Sugar's life as they were in that of the six co-defendants. This does not mean that the Court of Appeals was wrong in balancing the chance of prejudice to the six co-defendants against the "convenience", of Mr. Sugar, but only that in balancing between convenience and constitutional rights, the former factor can be as genuine an issue as the latter.

In a particular case even economy and efficiency are factors which may have a life force. We are presently in an era where crime is increasing, the percentage of trials is increasing, and the complexity of criminal litigation is increasing. Furthermore, an expansion in a number of trials means a delay in others which in itself might violate a substantial right. Eventually, the system will expand to meet this flood of increased litigation but it takes time to digest the confession hearings (*Jackson* v. *Denno*,

supra), taint hearings (*Gilbert* v. *California, supra; United States* v. *Wade, supra*), insanity hearings (*Pate* v. *Robinson,* 383 U. S. 375), suppression of tangible evidence hearings (*Mapp* v. *Ohio, supra*), an increased number of jury trials (*Duncan* v. *Louisiana, supra; Bloom* v. *Illinois, supra*), and the geometric increase in collateral attack on past convictions. This difficulty has been recognized repeatedly by this Court in holding certain new rulings prospective only. See cases cited at page 8, *supra.*

Even cost can be a human consideration in an era when state and local administration is actively competing directly with health, education and welfare for the tax dollar. A general policy favoring multiple trials for joint crimes will be costly in and of itself; but there are even instances where severance will result in so many* trials of such length (e.g., *Olivas* v. *Eyman,* 449 P. 2d 942 [Sup. Ct. Ariz., *in banc,* 1969]), that the expense is a consideration if the chance of prejudice is slight.

In order to determine whether there was serious risk of substantial prejudice, to a non-confessing co-defendant the court must consider the entire context of the trial including the quality of the limiting instructions, the nature of the confession, its relationship to the co-defendant, the kind of evidence introduced against the defendant, the weight of the other evidence, and the specific protection afforded the defendant's right of confrontation.

The quality of the limiting instructions is crucial in weighing the risk of prejudice. In certain cases precise and lucid instructions would be sufficient to insure against the possibility of prejudice. *Haggard* v. *United States,* 369 F. 2d 968 (8th Cir. 1966), *cert. denied* 386 U. S. 1023; *United States* v. *Smith, supra; People* v. *Camarillo,* 266 Cal.

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* For example a list of Federal multi-defendant trials in the Second Circuit is contained in Judge Moore's dissent in *United States* v. *Bozza, supra* at 229, n. 4.

App. 2d 266, 72 Cal. Rptr. 296 (1968); *People* v. *Willis*, 30 A. D. 2d 817 (3rd Dept. 1968). Also see Judge Medina's concurring opinion in *United States* v. *Delli Paoli, supra* at 322; *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D.N.Y. 1967).

Evidence that the instructions had, in fact, been effective would also be relevant in determining whether the jury was prejudiced against the non-confessing defendant. In *Fiswick* v. *United States*, 329 U. S. 211, the jury did express confusion about the extent to which one co-conspirator was bound by the act of another. In that case this Court held that it was improper to bind the co-conspirators by post-conspiracy admissions. However, had the trial court clearly and properly instructed the jury that the admissions of one defendant were inadmissible against the other, the willingness of the jury to follow such instructions would have been demonstrated by the question. Furthermore, if a jury were to acquit the defendant on one count which would have been supported by statements in the confession or if there was an acquittal of another co-defendant also implicated in the confession, the jury would have demonstrated its ability to discriminate in the given case. Compare *United States* v. *Bozza, supra*, where the fact that the only exhibit taken into the jury room was the confession of one of the defendants strongly supported an inference of prejudice to the co-defendants.

The nature of the co-defendant's admissions also is of critical importance in determining whether or not a jury might have been prejudiced by them. In *Bruton*, this Court emphasized that the declarant's implication of his co-defendant was unreliable because of the natural motivation of the co-defendant to exculpate himself thereby. *Id.* at 136. Also see *Barton* v. *United States*, 263 F. 2d 894 (5th Cir. 1959); *Dauer* v. *United States*, 189 F. 2d 343 (10th Cir. 1951). However, in specific cases the facts might prove the opposite. If the co-defendant assumed the larger share of guilt, his statement would not be inevitably suspect.

The amount of detail, the actions of the other party, and the dramatic tenor of the confession are also relevant factors. The lack of consequence of the report of the statements was held determinative in *Wapnick* v. *United States*, —— F. 2d —— (2d Cir. decided February 11, 1969), Sl. Sh. Op. No. 292 Sept. Term 1968, p. 1227; *United States* v. *Hoffa*, 402 F. 2d 380 (7th Cir. 1968). Evidence of oral confessions has tended to be less prejudicial (*Wapnick* v. *United States, supra*) than written (*United States* v. *Bozza, supra; United States* v. *Delli Paoli, supra*); but also less subject to redaction (*United States ex rel. Hill* v. *Deegan, supra*).

If the role of the co-defendant is severable and redacted from the version of the confession introduced at trial, that should be sufficient to overcome any chance of prejudice. *Bruton, supra* at 134; *Oliver* v. *United States*, 335 F. 2d 724 (D. C. Cir. 1964); *People* v. *Vitagliano*, 15 N. Y. 2d 360 (1965); *People* v. *Aranda*, 47 Cal. Rptr. 353 (1965).

Even if it is necessary to refer to another person in the narrative of the crime contained in the confession, redaction can be effective if any suggestion is removed as to who that other person is, e.g. *People* v. *Vitagliano, supra*. In *United States ex rel. LaBelle* v. *Mancusi*, 404 F. 2d 690 (2d Cir. 1968), it was held that the confession was not sufficiently redacted to protect the identity of the non-confessing brother. A different situation is presented in the case where there is overwhelming independent evidence of the guilt of the non-confessing defendant; but where there is no textual clue as to who the partner in crime might be. In such a case, a jury disobeying the judge's limiting instructions might know who the unidentified person was, but the chance that they would look to, or rely on, the co-defendant's statements is slight and the risk of prejudice *de minimis*. Where most of the evidence is introduced against both defendants, the reasons for a joint trial overcome the risk of prejudice arising out of the introduction of the co-defendant's confession and redaction is effective.

In general, the context, atmosphere of the trial, and the strength and independence of the evidence against the non-confessing defendant are crucial in determining whether or not the joint trial has created a serious risk of substantial prejudice to the non-confessing defendants, e.g. *Bruton* v. *United States, supra; United States* v. *Jones,* 402 F. 2d 851 (2d Cir. 1968), *cert. denied* March 24, 1969 (O. T. 1968, No. 1314 Misc.), 37 L. W. 3356; *Nelson* v. *United States,* 397 F. 2d 814 (9th Cir. 1968), *cert. denied* March 24, 1969 (O. T. 1968, No. 1095 Misc.), 37 L. W. 3356; *Golliher* v. *United States, supra; United States ex rel. Floyd* v. *Wilkins,* 367 F. 2d 900 (2d Cir. 1966); *Williamson* v. *United States, supra.* In a case where both or all the co-defendants made significant admissions, the chance of prejudice is substantially eliminated, since a person's own statement is far more dramatically damaging than that of his co-defendant who has the inherent motive for lying. Thus, in a case involving cross-implicating confessions, the United States Court of Appeals for the Second Circuit held that there was not the "'devastating' risk involved in Bruton". *United States ex rel. Catanzaro* v. *Mancusi,* 404 F. 2d 296 (2d Cir. 1968), *cf. United States ex rel. Johnson* v. *Yeager,* 399 F. 2d 508 (3rd Cir. 1968); *People* v. *Pohl,* 23 N. Y. 2d 290 (1968); *People* v. *Camarrillo, supra.*

Similarly, if the other evidence of guilt is strong, there is little risk that the jury will disobey the judge and turn to the confession in order to determine the non-confessant's guilt and even if they do, there is little risk that he would be prejudiced.

The manner in which the confession is introduced is significant in determining the risk of prejudice and an attempt by the prosecution to implicate the non-confessing defendant by means of the confession of his co-defendant is totally impermissible. A case in which that fact is involved must, under *Bruton,* be viewed with great skepticism. One of the factors that seems to influence this Court in *Bruton* was the deliberation with which Evans'

confession was spread before the jury. *Id.* at 136. Also see *People* v. *Aranda, supra; People* v. *Baker, supra; People* v. *Weis, supra.* By contrast, where care is used in the introduction of the confession so as not to implicate the co-defendant, that also is of significance in determining the risk of prejudice.

If the confession is mere surplusage as evidence against the declarant, but damaging to the co-defendant, several Courts have held that the proper procedure is to suppress the confession. *United States* v. *Gottfried,* 165 F. 2d 360 (2d Cir. 1948), *cert. denied* 333 U. S. 860; *United States* v. *Kahaner, supra.* Also see *Dauer* v. *United States, supra.*

Finally, we must remember that it is the right of confrontation that *Bruton* vindicates. In a case where the co-defendant took the stand, there is an opportunity to confront and cross-examine the declarant and the Sixth Amendment right is protected. *Santoro* v. *United States,* 402 F. 2d 920 (9th Cir. 1968); *People* v. *Willis, supra; People* v. *Burwell,* 30 A. D. 2d 842 (2d Dept. 1968). Compare *United States* v. *Bujece,* 405 F. 2d 888 (2d Cir., 1969).

It must be remembered that a co-defendant's credibility ordinarily is challenged very severely at the trial, unlike that of the ordinary hearsay declarant. The very party which introduces his confession is charging him with a crime and is out to blacken his character. It is also possible that the confessor challenges the credibility of his own confession effectively without taking the stand. Certainly, the jury which must determine the confessor's guilt is not without the ability to find him an incredible "witness" and his inherent motive to lie which this Court noted in *Bruton* at 136 may well be dramatically brought home in a given case. Argument of counsel combined with the facts regarding the co-defendant's character and confession may be the equivalent of the right of confrontation under certain circumstances.

One final fact must be mentioned in judging the risk of prejudice in a given case and that is the benefit which directly accrues to the non-confessing co-defendant from a joint trial. In every case he benefits from his co-defendant's Fifth Amendment right not to testify. Thus in this case, had Harrington been tried separately, he might well have had three very powerful witnesses against him, his three co-defendants who had been previously tried and convicted. While his Sixth Amendment right to confrontation might be abridged, he is concomitantly shielded from very damaging evidence and we can understand Judge Hand's cryptic comment that a joint trial where confessions are introduced on balance "probably furthers rather than impedes the search for truth". *Nash* v. *United States*, *supra* at 1007.

In any event, the fact that his co-defendant might directly testify against him in a separate trial is a tactical reason for a defendant to refrain from moving to sever his trial from that of his co-defendant. The failure to make a timely motion should ordinarily be decisive in upholding the joint trial. See *Delli Paoli* v. *United States*, *supra*; *United States ex rel. Hill* v. *Deegan*, *supra*. But see *Bruton* v. *United States*, *supra*. Also see *United States* v. *Hoffa*, *supra*; *Calloway* v. *United States*, 399 F. 2d 1006 (D. C. Cir. 1968); *Williamson* v. *United States*, *supra* at 197.

Finally, it must be recognized that the possible implications of *Bruton* with respect to any evidentiary questions and the reliance which ever can be placed on the jury to follow instructions and to apply the law to the facts extend far beyond the broadest holding of that case itself. However, should the state courts and the lower federal courts wish to re-examine contiguous areas of criminal procedure, for example, the introduction of hearsay, the joinder of counts for trial, the use of conspiracy charges and a myriad of evidentiary matters, they are likely to hesitate in the face of a holding that *Bruton* announced a

per se retroactive rule. Any new holding relying on *Bruton* would be likely to require the same application although these questions, like the one presented here, turn on the facts of the individual cases. Thus, a *per se* rule would, in the long run, stultify the development of the law by making the front-line judges reluctant to undertake such drastic extensions of new rules and to apply them to every past and future prosecution.

CONCLUSION

For all the foregoing reasons we respectfully submit that the decision of the California Court of Appeal should be affirmed and that this Court should hold that a defendant tried jointly with a co-defendant who confessed must show that there was a serious risk that the introduction of that confession against his co-defendant substantially prejudiced his right to a fair trial.

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